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Attorneys for Plaintiff United States of America

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SOUTH MOUNTAIN FARMS, INC.,
JOHN M. WILLIAMS, JR.,
HUDSON FARMS, INC.,

Defendants.

CIV. NO. 89-1704-PHX-EHC

CONSENT DECREE

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DISTRICT OF ARIZONA
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I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a Complaint in this matter on October 16, 1989, pursuant to Section 107(a) of the Comprehensive Environmental Response, Compensation, Liability Act of 1980, 42 U.S.C. § 9607(a), as amended ("CERCLA").

B. The United States in its Complaint seeks reimbursement of response costs incurred by EPA and the Department of Justice for response actions in connection with the release or threatened release of hazardous substances at the Gila River Indian Reservation Superfund Site in Maricopa County, Arizona ("the Site").

C. Defendants have asserted a counterclaim for contribution against the United States pursuant to Section 113 of CERCLA, 42 U.S.C. § 9613.

D. The Parties that have entered into this Consent Decree ~~deny any and all liability arising out of the transactions or~~ occurrences alleged in the Complaint or Counterclaim.

E. The United States and the Settling Defendants agree and the Court by entering this Consent Decree finds, that settlement of this matter, in accordance with the terms of this Consent Decree will avoid prolonged and complicated litigation and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. § 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying Complaint, the Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District and shall not challenge the entry of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon the Settling Defendants and their successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of the Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever

terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

b. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period ~~shall run until the close of business of the next working day.~~

~~c. "EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.~~

d. "Interest," in accordance with 42 U.S.C. § 9607(a), shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507.

e. "Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

~~f. "Parties" shall mean the United States of America and the Settling Defendants.~~

g. "Plaintiff" shall mean the United States of America.

h. "Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs including attorney time, that EPA and the United States Department of Justice on behalf of EPA have incurred for response actions at the Site prior to the date of entry of this Consent Decree, and accrued

Interest on such costs through the date of entry of this Consent Decree.

i. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

j. "Settling Defendants" shall mean South Mountain Farms, Inc., John M. Williams, Jr., and Hudson Farms, Inc.

k. "Site" shall mean the Gila River Indian Reservation Superfund Site, located on the Gila River Indian Reservation in Maricopa County, Arizona, in Section 20, Range 2 East, Gila and Salt River Baseline and Meridian, and commonly referred to as the 51st Avenue Airstrip.

l. "United States" means the United States of America and its departments and agencies, including the United States Environmental Protection Agency and the United States Department of Interior.

V. REIMBURSEMENT OF RESPONSE COSTS

4. Payment of Response Costs to the United States

Within 30 days of the effective date of this Consent Decree,
the Settling Defendants shall pay \$1,139,486.00 to the United States by Electronic Funds Transfer ("EFT") to the United States Department of Justice lockbox bank, referencing CERCLA Site Number 09-63 and the United States Attorney's Office file number 8903205. Payment shall be made in accordance with instructions set forth in Exhibit A. Any EFT received at the United States Department of Justice lockbox bank after 11:00 a.m. (Eastern Time) will be credited on the next business day.

5. Contribution by the United States. Within a reasonable time after entry of this Consent Decree, the United States, on behalf of the United States Department of the Interior, Bureau of Indian Affairs, shall cause to be transferred to the EPA Hazardous Substance Superfund a contribution of \$25,000.00, referencing CERCLA Site Number 09-63 and the United States Attorney's Office file number 8903205.

6. Anti-Deficiency Act. The contribution by the United States on behalf of the Department of the Interior, Bureau of Indian Affairs, is subject to the availability of appropriated funds. No provision of this decree shall be interpreted as or constitute a commitment or requirement that the United States obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341.

VI. FAILURE TO MAKE TIMELY PAYMENTS

7. Interest. In the event that payment required by Paragraph 4 is not made within 30 days of the effective date of this Consent Decree, Settling Defendants shall pay Interest on the unpaid balance and such Interest shall be compounded each fiscal year. The Interest on such unpaid balance shall begin to accrue on the 30th day after the effective date of this Consent Decree. For fiscal year 1993, the rate of Interest is 3.49%.

8. Stipulated Penalty. If any amounts due to the United States under this Consent Decree are not paid by the required date, the Settling Defendants shall pay as a stipulated penalty, in addition to the Interest required by Paragraph 7,

\$1,000 per day that such payment is late. Stipulated penalties are due and payable within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties. All payments under this Paragraph shall be paid by certified check made payable to "EPA Hazardous Substance Superfund," shall be mailed to the United States Environmental Protection Agency, Region 9, Superfund Accounting, P.O. Box 360863M, Pittsburgh, Pa. 15251, Attention: Collection Officer for Superfund, and shall reference CERCLA Site No. 09-63 and DOJ Case Number 90-11-3-536.

Copies of check[s] paid pursuant to this Paragraph, and any accompanying transmittal letter, shall be sent to the United States as provided in Section X (Notices and Submissions). Penalties shall accrue as provided above regardless of whether EPA has notified the Settling Defendants of the violation or made a demand for payment, but need only be paid upon demand.

9. If the United States must bring an action to collect any payment required by this Consent Decree, the Settling Defendants shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

10. Payments made under Paragraphs 7-9 shall be in addition to any other remedies or sanctions available to the United States by virtue of Settling Defendants' failure to make timely payments required by this Consent Decree.

VII. COVENANTS NOT TO SUE BY PLAINTIFF

11. Except as specifically provided in Paragraph 12, the United States covenants not to sue Settling Defendants under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), in any civil or administrative proceeding to recover Response Costs as defined in this Consent Decree. This covenant not to sue shall take effect upon the receipt by the United States of all payments required by Sections V and VI of this Consent Decree. ~~This covenant not to sue extends only to the Settling Defendants and does not extend to any other person.~~

12. The covenant not to sue set forth in Paragraph 11 does not pertain to any matters other than those expressly specified therein. Except as specifically provided in Paragraph 11, nothing contained in this Consent Decree shall in any way limit or restrict the response and enforcement authority of the United States to initiate appropriate action, either judicial or administrative, under Sections 104, 106 and 107 of CERCLA, 42 U.S.C. §§ 9604, 9606, 9607, or any other provision of law, against Settling Defendants or any other person or entity not a party to this Consent Decree. The United States reserves, and this Consent Decree is without prejudice to, all rights against each Settling Defendant with respect to all matters other than those expressly specified in the covenant not to sue set forth in Paragraph 11 of this Section, including but not limited to:

- (1) claims based upon failure by Settling Defendants to meet any requirement of this Consent Decree;
- (2) claims for costs incurred or to be incurred by the the United States in connection with the Site that are not within the definition of Response Costs set forth in Section IV of this Consent Decree;
- (3) claims for injunctive relief;
- ~~(4) liability for damages for injury to, destruction~~
~~of, or loss of natural resources; and~~
- (5) criminal liability.

VIII. COVENANTS BY SETTLING DEFENDANTS

13. Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to Response Costs or this Consent Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507), under CERCLA Sections 106(b)(2), 107, 111, 112, or 113, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, 9613, or any other provision of law, any claim against the United States, including any department, agency, or instrumentality of the United States pursuant to CERCLA Sections 107 and 113, 42 U.S.C. §§ 9607 and 9613, related to Response Costs, or any claims arising out of response activities at the Site. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within

the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

IX. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION

14. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and ~~causes of action which each party may have with respect to any~~ ~~matter, transaction, or occurrence relating in any way to the~~ Site against any person not a party hereto.

15. With regard to claims for contribution against Settling Defendants or the United States for matters addressed in this Consent Decree, the Parties hereto agree that the Settling Defendants and the United States are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

16. ~~Settling Defendants agree that with respect to any~~ ~~suit or claim for contribution brought by them for matters~~ related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify

the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial for matters related to this Consent Decree.

17. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section VII (Covenants Not to Sue by Plaintiff).

18. Defendant Hudson Farms, Inc., has filed a petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Arizona, Case No. 90-03741-PHX-GBN. Defendant Hudson Farms, Inc., represents that its participation in this settlement is being funded through an insurance carrier or carriers and that, therefore, its participation in this settlement is not subject to the approval of the United States Bankruptcy Court for the District of Arizona.

X. NOTICES AND SUBMISSIONS

19. Whenever, under the terms of this Consent Decree, notice or demand is required to be given or a document is required to be sent by one party to another, it shall be directed by certified mail, return receipt requested, to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered ~~effective upon receipt unless otherwise provided. Written notice~~ as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States and the Settling Defendants, respectively.

As to the United States:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
Re: 90-11-3-536

As to Settling Defendants:

Nicholas Wallwork, Esq.
Lucas J. Narducci, Esq.
O'Connor, Cavanagh, Anderson, Westover,
Killingsworth & Beshears, P.A.
One East Camelback Road, Suite 1100
Phoenix, Arizona, 85012-1656
(For Defendants John M. Williams, Jr.,
and South Mountain Farms, Inc.)

Coni Rae Good, Esq.
Teilborg, Sanders & Parks, P.C.
3030 N. Third Street, Suite 1300
Phoenix, Arizona 85012-3039
(For Defendant Hudson Farms, Inc.)

XI. EFFECTIVE DATE

20. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

XII. RETENTION OF JURISDICTION

21. This Court shall retain jurisdiction of this matter for the purpose of enforcing the terms of this Consent Decree.

XIII. SIGNATORIES/SERVICE

22. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for the Environment and Natural Resources Division of the United States Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

23. Each Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree.

24. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of

the agreement may not be used as evidence in any litigation
between the Parties.

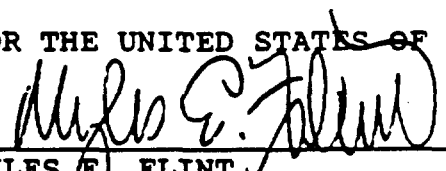
SO ORDERED THIS 2 DAY OF August, 1993.

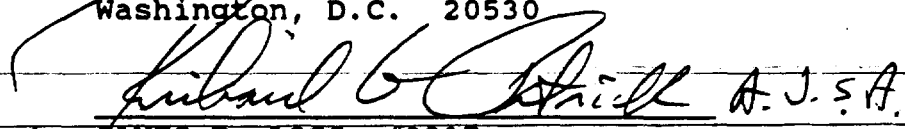
Earl H. Carroll
Earl H. Carroll
United States District Judge


THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. South Mountain Farms, Inc., et al., CIV. NO. 89-1704-PHX-EHC, relating to the Gila River Indian Reservation Superfund Site.

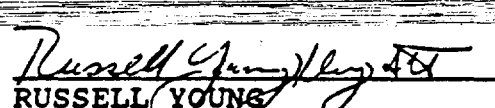
Date: July 29, 1993


FOR THE UNITED STATES OF AMERICA


MYLES E. FLINT
Acting Assistant Attorney General
Environment and Natural Resources
Division
U.S. Department of Justice
Washington, D.C. 20530

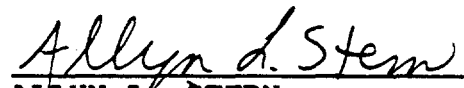

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ALLYN I. STERN

Assistant Regional Counsel
U.S. Environmental Protection
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75 Hawthorne Street
San Francisco, California 94105

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. South Mountain Farms, Inc., et al., CIV. NO. 89-1704-PHX-EHC, relating to the Gila River Indian Reservation Superfund Site.

FOR SOUTH MOUNTAIN FARMS, INC.

Date: JUNE 3, 1993

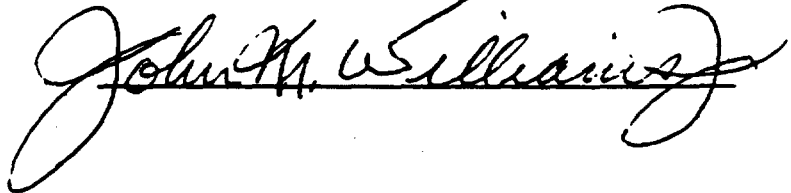
John H. Williams, Jr.
President

Agent for service of process:

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. South Mountain Farms, Inc., et al., CIV. NO. 89-1704-PHX-EHC, relating to the Gila River Indian Reservation Superfund Site.

FOR JOHN M. WILLIAMS, JR.

Date: JUNE 3, 1993



Agent for service of process:

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. South Mountain Farms, Inc., et al., CIV. NO. 89-1704-PHX-EHC, relating to the Gila River Indian Reservation Superfund Site.

FOR HUDSON FARMS, INC.

Date: May 24, 1993

David R. Hudson Pres.

Agent for service of process:

ALFRED J. OLSEN

OLSEN-SMITH, LTD.

301 E. VIRGINIA #3300

PHOENIX, AZ 85004

Date: _____

**INSTRUCTIONS FOR ELECTRONIC FUNDS
TRANSFER TO THE DEPARTMENT OF JUSTICE**

(Omitted items will be provided by sending bank)

<u>Item</u>	<u>Explanation of Item</u>	<u>Information to be Coded</u>
2	Receiving Bank Code (Citizens & Southern National Bank, Atlanta, GA)	061000052

7	Amount to be Transferred	\$ 1,139,486.00
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9	Receiving Bank Code	CIS(space)ATL(space)
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10	Department of Justice Account Number	00924449
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11	Payee Name	U.S. Attorney/District of Arizona
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12	Deposit Identifier Debtor USAO No.	AZT-3-EFT 8903205/09-63
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Please Note: Item 12 must be completed to apply your payment correctly.

Your (Sending) Bank Name & Branch: _____

Address: _____

Contact Name and phone number: _____